Seeking Supervision: An Analysis of Recent Trends in the Definition of 'Supervisor' Argument and a Recommendation for the Eleventh Circuit

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SEEKING SUPERVISION: AN ANALYSIS OF RECENT TRENDS IN THE DEFINITION OF ‘SUPERVISOR’ ARGUMENT AND A RECOMMENDATION FOR THE ELEVENTH CIRCUIT

INTRODUCTION

Donna Rhodes worked for the Illinois Department of Transportation as a highway maintenance worker from 1996 until 1999. Ms. Rhodes worked at a maintenance yard under two men who had the authority to assign her tasks and recommend disciplinary action. Rhodes claimed that during the three years she worked at the yard, one of the two men confronted her numerous times and made lewd sexual remarks directed towards her. Rhodes also alleged that the men made decisions affecting her daily schedule that she claimed amounted to sexual harassment. Even though the men represented the only onsite authority at the maintenance yard, and they had the power to recommend disciplinary actions be taken against Ms. Rhodes, the Seventh Circuit Court of Appeals determined that the two men did not qualify as “supervisors” for Title VII sexual harassment purposes because they did not have the power to “hire, fire, transfer, promote, demote, or discipline” Ms. Rhodes.

While the Seventh Circuit Court of Appeals determined that the two men did not qualify as supervisors, the Second Circuit Court of Appeals likely would have decided the issue differently. The Second Circuit identifies a supervisor as one who has the ability to take or recommend tangible employment actions against an employee or has

1. Rhodes v. Ill. Dep’t of Transp., 359 F.3d 498, 501 (7th Cir. 2004).
2. Id. at 502.
3. Id.
4. Id.
5. Id. at 502, 506.
6. See generally Mack v. Otis Elevator Co., 326 F.3d 116, 127 (2nd Cir. 2003) (adopting the EEOC’s stance that a supervisor is one who has the ability to undertake or recommend a decision to hire, fire, promote, demote, discipline, or direct the employee’s daily activities).
control over an employee's daily activities.⁷ Since Ms. Rhodes could have argued that these men had the ability both to recommend that she be disciplined and to control her daily activities, the Second Circuit would have held the company to a higher liability standard.⁸ These two approaches are the centerpieces in the debate over how to determine who is a supervisor for Title VII harassment purposes.⁹

This debate developed after the Supreme Court established a framework for imposing vicarious liability upon employers for the actions of their supervisors in Title VII harassment cases.¹⁰ The Court, however, has failed to elaborate on who qualifies as a supervisor, and lower courts have struggled when addressing this issue.¹¹ One expert recently referred to the approach taken by the Seventh Circuit Court of Appeals as the "narrow view" and described the approach adopted by the Second Circuit Court of Appeals and the Equal Employment Opportunity Commission (EEOC) as the "broader view."¹²

This Note will address recent cases and trends that represent or affect the split between the courts on how to determine who is a supervisor for Title VII harassment claims.¹³ This Note will also address an alternative interpretation of the narrow view, which may provide a compromise approach for courts.¹⁴ Lastly, this Note will provide a recommendation for the Eleventh Circuit Court of Appeals.¹⁵

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⁷. Id. at 127.
⁸. See Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 910 (E.D. Tenn. 2003) (stating that if the alleged harasser is a coworker the plaintiff must show that the employer knew or should have known of the harassment, but if the harasser is a supervisor, then the employer is subject to vicarious liability).
¹¹. See Browne, 286 F. Supp. 2d. at 912.
¹². Matusewitch, supra note 9.
¹³. See infra Parts I-V.
¹⁴. See infra Parts II-A and VI.
¹⁵. See infra Parts VI-VII.
Part I of this Note will discuss the vicarious liability framework that the Supreme Court articulated in Ellerth and Faragher. Part II will examine the decisions of those courts that have purportedly subscribed to a narrower definition of supervisor. Part III will analyze both the benefits and questions surrounding the "broader view" of supervisor. Part IV examines the logic and arguments that may arise out of the Supreme Court's recent decision that analyzed whether an employer is liable when a supervisor causes an employee to be constructively discharged. Part V will examine the limited case law covering the supervisor issue by courts within the Eleventh Circuit. Finally, Part VI will examine the changing face of the workplace and will also discuss which approach best suits a society moving towards a team-oriented corporate structure.

I. Ellerth and Faragher: Changing the Landscape of Harassment Claims

Until 1998, courts generally held employers vicariously liable for discrimination that resulted in a change in an employee's terms or conditions of employment. Courts distinguished these quid pro quo cases, in which an employer carried out a threat of change in the conditions of employment, from hostile environment cases involving "severe or pervasive" treatment of the employee, but where the employer did not change the employment conditions. But the Supreme Court decided in 1998 that the issue of vicarious liability should no longer be strictly tied to the question of whether the case could be labeled quid pro quo or hostile environment. Instead, the Court developed a new framework for holding employers liable for

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16. See infra Part I.
17. See infra Part II.
18. See infra Part III.
19. See infra Part IV.
20. See infra Part V.
21. See infra Part VI.
23. Id. at 752-54.
24. Id. at 754.
the actions of supervisors. This section will analyze the Court’s reasoning and then examine the importance of the supervisor definition in light of the Court’s decisions.

A. Ellerth and Faragher: Establishing the New Vicarious Liability Framework

In 1998, the Supreme Court analyzed whether an employer could be vicariously liable for the actions of a supervisor in a Title VII harassment case. Specifically, the Court faced the issue of what standard of liability an employer should face in cases where a supervisor harasses an employee but no tangible employment action is taken against the employee.

In Ellerth, the employee suffered from “repeated boorish and offensive remarks and gestures” made by her supervisor. Although the employee claimed she resigned her position due to the remarks, the Court distinguished her case from cases where a supervisor had taken a tangible employment action. The Court defined a tangible employment action as any action that “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” In those cases where a supervisor takes a tangible employment action, the employer should be vicariously liable for the actions of the supervisor.

In drawing this conclusion, the Court looked to the rules of agency for direction. Specifically, the Court pointed to section 219(2)(d) of the Restatement of Agency, which states that an employer is not liable for the actions of his employees unless “the servant purported to act or to speak on behalf of the principle and there was reliance upon

25. Id. at 754-55.
26. See infra Part I.A.
29. Id.
30. Id. at 748, 751-52, 766.
31. Id. at 761.
32. Id. at 762-63.
33. See id. at 758, 760.
apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.\textsuperscript{34} The Court stated that it is clear when a supervisor takes a tangible employment action the employment relationship aids the supervisor, so the employer should be held vicariously liable.\textsuperscript{35}

A more vexing issue arises when asking whether an employer should be held liable when a supervisor harasses an employee, but the supervisor does not take a tangible employment action against the employee.\textsuperscript{36} In \textit{Ellerth}, the Court stated that a supervisor's conduct had a more threatening character because of the agency relationship but refused to impart vicarious liability for all acts of a supervisor.\textsuperscript{37} Instead, the Court decided to pursue a rule encouraging employers to create policies and procedures that would help eliminate sexual harassment in the workplace.\textsuperscript{38}

The Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, . . . ."\textsuperscript{39} The defense requires "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."\textsuperscript{40} The Court also noted that there should be no affirmative defense in those cases where the supervisor takes steps that "culminate in a tangible employment action."\textsuperscript{41}

\begin{footnotes}
\item[34] See \textit{Ellerth}, 524 U.S. at 758 (quoting \textsc{Restatement (Second) of Agency} \textsection{}219(2)(d) (1958)).
\item[35] Id. at 760.
\item[36] Id. at 763.
\item[37] Id. at 763-64.
\item[38] Id. at 764.
\item[39] Id.
\item[40] \textit{Ellerth}, 524 U.S. at 765.
\item[41] Id.
\end{footnotes}
The Court applied the holding in *Ellerth* to another case heard that same day. In *Faragher*, the Court elaborated on its decision to establish an affirmative defense in cases where the supervisor does not take a tangible employment action. The Court instituted an affirmative defense in such cases instead of requiring a plaintiff to prove that the supervisor actively used the power allocated to him by his employer.

### B. Why Is the Distinction Between Supervisor and Co-Employee Important?

In *Faragher*, the Court also elaborated on why the standard for imposing liability on an employer for a supervisor’s actions should be greater than the negligence standard applied when a co-employee acts. When a supervisor harasses an employee, that employee may be “reluctant to accept the risks of blowing the whistle on a superior.” The employee will likely feel more capable of responding to harassment by a co-employee than a supervisor because the co-employee does not hold the power of the agency relationship and cannot take a tangible employment action against the victim.

#### 1. Commentators Weigh in on the Importance of the Supervisor Definition

After the decisions in *Ellerth* and *Faragher*, the importance of the supervisor classification arose in the debate surrounding the claim of constructive discharge. The Supreme Court recently considered whether the constructive discharge of an employee caused by the hostile environment created by a supervisor could be classified as a

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43. *See* id. at 805.
44. *Id.*
45. *See* id. at 803.
46. *Id.*
47. *Id.*
tangible employment action for Title VII purposes.\textsuperscript{49} The issue raised important questions because if a supervisor constructively discharged an employee, then courts might have chosen to hear the affirmative defense on behalf of the employer.\textsuperscript{50} One critic finds the distinction insignificant because courts were treating the affirmative defense as if it implied a negligence standard.\textsuperscript{51} If this commentator is correct, then it may not matter whether employees are categorized as co-employees or supervisors if employers take no tangible employment action.\textsuperscript{52}

Another scholar agreed that even when an employee has supervisory status, many courts incorrectly apply the affirmative defense established in Ellerth.\textsuperscript{53} Many courts have granted too many summary judgments based on the affirmative defense though the Supreme Court did not intend for the defense to weigh so heavily towards the management side of the dispute.\textsuperscript{54} While these criticisms may indicate faulty application of the Ellerth framework, critics still imply that if the courts apply the doctrine properly, the issue of who is a supervisor may still be significant.\textsuperscript{55}

Despite these arguments, the distinction remains important to many courts and their litigants because of the different burdens of proof placed on employers when a court considers an employee as a supervisor.\textsuperscript{56} Courts have held that an employer is only liable for co-employee harassment when the employer was "negligent either in discovering or remedying the harassment."\textsuperscript{57} To establish the employer's negligence, the employee must prove that she took affirmative steps to notify the employer of the harassment.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{49} Id. at 139.
\item \textsuperscript{50} Martha Chamallas, \textit{Title VII's Midlife Crisis: The Case of Constructive Discharge}, 77 S. Cal. L. Rev. 307, 390-91 (2004).
\item \textsuperscript{51} Id. at 354.
\item \textsuperscript{52} See id.
\item \textsuperscript{54} Id. at 1421-22.
\item \textsuperscript{55} See generally id.
\item \textsuperscript{56} See Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 911-12 (E.D. Tenn. 2003).
\item \textsuperscript{57} Parks v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998).
\item \textsuperscript{58} Hall v. Bodine Elec. Co., 276 F.3d 345, 356 (7th Cir. 2002).
\end{itemize}
In cases where a supervisor harasses a fellow employee but no tangible employment action is taken, the employer must rely on an affirmative defense. Even though an employer has an affirmative defense in supervisor actions, "the defendant bears the burden of proof . . . and the elements can be difficult to meet. Thus, it is of great benefit to defendants for the harasser to be a co-employee rather than a supervisor." Lower courts continue to disagree over how to distinguish between co-employees and supervisors after the Ellerth and Faragher decisions.

II. THE NARROW OR TRADITIONAL APPROACH

This Part will discuss the origin and application of the Parkins rule in the Seventh and Eighth Circuit Courts of Appeals. Additionally, this Part will discuss common criticisms of the Parkins rule. Lastly, this Part will examine an alternate interpretation of the Parkins rule, which addresses many of the criticisms that are common when applying the Parkins definition of supervisor.

A. The Parkins Definition

In 1998, the Seventh Circuit Court of Appeals addressed the issue of defining the term "supervisor" in Title VII claims in Parkins. There, the court answered the question: "how much or what kind of authority must an individual possess to be a true supervisor." The court concluded that an employee who has "the power to hire, fire, demote, promote, transfer, or discipline an employee" is a supervisor for vicarious liability purposes. The court analyzed other circuit court decisions and determined that the prevailing opinion was that

60. Browne, 286 F. Supp. 2d at 910.
61. Id. at 912.
62. See Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027 (7th Cir. 1998); infra Part II.A.
63. See id.
64. See infra Part II.B.
65. Parkins, 163 F.3d at 1033.
66. Id.
67. Id. at 1034.
an employee is a supervisor when he has the ability to “affect the terms and conditions of the victim’s employment.”\textsuperscript{68}

1. Application of the Parkins Definition

Several district courts and courts of appeals have either cited Parkins or attempted to follow a definition similar to the one applied in Parkins.\textsuperscript{69} But a question arose in the application of Parkins.\textsuperscript{70} Must one have the actual power to take a tangible employment action to be considered a supervisor, or does the definition of supervisor also include those with the ability to “recommend, set in motion, or effect such actions”?\textsuperscript{71} This section will analyze how several courts apply the Parkins definition.\textsuperscript{72} Additionally, this section will address whether these courts require a person have direct authority to take tangible employment actions to be defined as a supervisor.\textsuperscript{73}

The Seventh Circuit continues to apply the definition of supervisor it first articulated in Parkins.\textsuperscript{74} For example, the Seventh Circuit held in Hall that an employee did not qualify as a supervisor unless he had the authority to “directly affect the terms and conditions of a victim’s employment.”\textsuperscript{75} The court also held that even though a fellow employee oversaw the daily activities of a co-employee and “provided input into her performance evaluations,” the employee did not qualify as a supervisor because he lacked the power to “‘hire, fire, demote, promote, transfer, or discipline’ Hall.”\textsuperscript{76}

The court used the phrase “directly affect,” which can arguably be interpreted to mean “directly influence” the outcome of future events.\textsuperscript{77} Within the context of the court’s argument, however, one may infer that what it really meant was that to qualify as a supervisor,

\textsuperscript{68} Id.
\textsuperscript{70} Id. at 916.
\textsuperscript{71} Id.
\textsuperscript{72} See infra Part II.A.1.
\textsuperscript{73} See infra Part II.A.1.
\textsuperscript{74} See Rhodes v. Ill. Dep’t of Transp., 359 F.3d 498, 505-06 (7th Cir. 2004); Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002).
\textsuperscript{75} Hall, 276 F.3d at 355.
\textsuperscript{76} Id. (emphasis added).
\textsuperscript{77} See id.
an employee must be able to directly effect, or directly cause an event to occur. Such a reading would contradict any interpretation of Parkins that defines supervisors as those who can recommend or set in motion tangible employment actions.

The Seventh Circuit relied on its reasoning in Hall two years later when it decided Rhodes v. Illinois Department of Transportation. In Rhodes, a female highway maintenance employee worked under two men who had the ability to assign her tasks and recommend sanctions against her but did not have the ability to “hire, fire, transfer, promote, demote, or discipline” her. The court held that the two men did not supervise the employee even though they had the ability to recommend sanctions. The court apparently reasoned that the ability to recommend sanctions did not give the men the authority to make decisions affecting the discipline of Rhodes. Since the men could recommend sanctions, one could interpret the court’s definition of “directly affect” to mean that only those who have the authority to make the final decision on tangible employment actions are supervisors.

The Eighth Circuit Court of Appeals also took a narrow view of the definition of supervisor. In Joens v. John Morrell & Co., an employee at a meat packing plant worked in a box shop during the evening shift. The plaintiff testified that she did not have direct supervision at night but considered the day shift superintendent of the box shop to be her supervisor. The court held that the day shift superintendent did not serve as the plaintiff’s supervisor for Title VII applications.

78. See generally Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 971-72 (D. Minn. 1998) (stating that some courts define supervisors as those who have “plenary authority” to cause tangible employment actions, while other courts define supervisory employees as those “who retained something less than plenary authority” over such decisions).
80. 359 F.3d 498, 506 (7th Cir. 2004).
81. Id. at 502.
82. Id.
83. Id.
84. Id.
86. 354 F.3d 938, 939 (8th Cir. 2004).
87. Id.
purposes even though he had the power to provide written
disciplinary evaluations regarding the plaintiff's behavior.\textsuperscript{88}

The Eighth Circuit focused on two factors in rejecting the
plaintiff's argument that the superintendent's ability to provide
written disciplinary evaluations made him a supervisor.\textsuperscript{89} First, the
court noted that although the superintendent had the authority to write
up the employee, he never exercised this power.\textsuperscript{90} But this contradicts
the rule the court attempted to follow.\textsuperscript{91} According to the court, the
majority of courts "hold that, to be a supervisor, the alleged harasser
must have had the power \textit{(not necessarily exercised)} to take tangible
employment action against the victim."\textsuperscript{92} This rule focuses on the
mere existence of authority to take tangible employment action and
not the exercise of such authority, and it appears the court
contradicted itself when it focused on the fact that the superintendent
never actually exercised his power to write up the plaintiff.\textsuperscript{93}

Secondly, the court stated that although the superintendent had the
authority to write up the employee, "the power to discipline lay with .
... [the] Human Resources Department."\textsuperscript{94} This implies that because
the superintendent lacked the authority to directly discipline the
employee, he did not qualify as a supervisor for Title VII purposes.\textsuperscript{95}
By focusing on the supervisor's ability to be the final actor, the
Eighth Circuit implicitly rejected any rule that allows plaintiffs to
recover if the supervisor could recommend or set in motion a tangible
employment action against the employee.\textsuperscript{96}

The Eighth Circuit continued to apply this stringent test in future
cases.\textsuperscript{97} In \textit{Weyers v. Lear Operations Corp.}, a team leader had the
power to make formal evaluations of an employee and those

\textsuperscript{88} \textit{Id.} at 941.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{See Joens}, 354 F.3d at 940.
\textsuperscript{92} \textit{See id} (emphasis added).
\textsuperscript{93} \textit{See id.}
\textsuperscript{94} \textit{Id.} at 941.
\textsuperscript{95} \textit{See Weyers v. Lear Operations Corp.}, 359 F.3d 1049, 1057 (8th Cir. 2004).
\textsuperscript{96} \textit{See id.}
\textsuperscript{97} \textit{Id.} at 1056-57.
evaluations played a role in the employee’s termination. The court rejected the plaintiff’s argument that the alleged discriminator was a supervisor because the employee “himself did not have the power to take tangible employment action.”

2. Criticisms of the Narrow Rule

By defining supervisors as only those who have the direct authority to take final employment action, the Seventh and Eighth Circuit Courts of Appeals have made themselves vulnerable to the argument that employers may attempt to escape liability by allowing only human resource managers or other company executives to hire, fire, or promote employees. Judges are beginning to question the application of this bright line rule especially as difficult fact patterns arise. For example, a Seventh Circuit judge summarized the deficiencies associated with the narrow view in a partial concurrence to Rhodes. There, Judge Rovner questioned whether the Seventh Circuit’s position might be too narrow. Judge Rovner said that the Seventh Circuit adopted the rule because of the “allure of drawing a bright line between those who have the power to make formal employment decisions and those who do not.” In Rhodes, the narrow definition did not protect employees who worked under managers given substantial authority by their employers but not the authority to hire, fire, promote, demote, or transfer an employee. Judge Rovner argued this could be especially troublesome if employers have multiple worksites and the home office reserves the power to take tangible employment actions. Allowing employers to take the power out of managers’

98. Id. at 1056.
99. Id. at 1057.
101. See Rhodes v. Ill. Dep’t of Transp. 359 F.3d 498, 509-10 (7th Cir. 2004) (Rovner, J., concurring).
102. Id.
103. Id.
104. Id. at 510.
105. Id.
106. Id.
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hands would prevent employers from being vicariously liable for the actions of their managers even when managers have significant power over their employees.107

B. An Alternative Interpretation of Parkins

Other courts have interpreted the Parkins rule more broadly by identifying supervisors as those who have the power to "recommend, set in motion, or effect [employment] actions."108 Supporters of this interpretation argue that supervisors do not need absolute control over tangible employment actions to be considered supervisors.109

One district court noted that the Parkins rule defines a supervisor as anyone who has the power to "initiate, recommend, or effect tangible employment actions affecting the economic livelihood of the supervisor's subordinates."110 The court in Browne emphasized that a supervisor must have the "ability" to effect a tangible employment action.111 The court also stated that the supervisor need not have the authority to take the final action against the employee.112 Thus, a supervisor is one who can at least "recommend, set in motion, or effect [employment] actions."113 This definition enables proponents of the narrower view to allay concerns that employers will attempt to escape liability by removing the power to take tangible employment actions from traditional supervisors and then placing this power in the hands of a distant executive or human resources manager.114

Another commentator stated that the "traditional 'hiring, firing, or conditions of employment' definition" does not "require employees to have the ultimate authority to make hiring and firing decisions in

107. Rhodes, 359 F.3d at 510 (Rovner, J., concurring).
108. Id.; see also Brief for Petitioner at 5, Mack v. Otis Elevator Co., 326 F.3d 116 (2nd Cir. 2003), cert. denied, 72 USLW 3147 (U.S. Nov. 17, 2003) (No. 03-229) (appealing to the Supreme Court of the United States, petitioner used the Browne argument that the Parkins argument "also considers as a supervisor anyone who can recommend or influence a tangible employment action" (citing Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 914 (E.D. Tenn. 2003)).
109. See Browne, 286 F. Supp. 2d at 916.
110. Id. at 918.
111. Id. at 916.
112. Id.
113. Id.
114. Id.
order to qualify as supervisors; instead, the employees merely needed to exercise significant control over such decisions. Proponents of this “significant control” definition argue that employees who have the mere power to recommend tangible employment actions are not always included in the definition of supervisor. While this distinction could explain the refusal of the Seventh and Eighth Circuits to extend the definition of supervisor to those who can merely recommend disciplinary action or termination, the reasoning in those decisions does not reflect any inquiry into whether an employee had significant control over tangible employment actions.

This diverse interpretation of the narrow view illustrates the difficulty of defining who is a supervisor for Title VII claims. Even within the narrow view, there appears to be a debate about where to draw the line. Other courts have taken a completely different position when answering the question of who is a supervisor for Title VII purposes.

### III. THE BROADER VIEW

Until 2002, all of the circuit courts that directly addressed the question of who is a supervisor in Title VII harassment cases used some variation of the narrow approach articulated above. In 2003, the Second Circuit Court of Appeals adopted a broader test.


116. *See id.* at 133.

117. *See Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002); see also Joens v. Morrell & Co., 354 F.3d 938, 940-41 (8th Cir. 2004).*

118. *See generally Grodzanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 971-72 (D. Minn. 1998) (discussing the debate among courts over the question of whether a supervisor must have plenary power to take tangible employment actions).*

119. *Id.*

120. *See generally Mack v. Otis Elevator Co., 326 F.3d 116, 125-27 (2nd Cir. 2003) (holding that employees who do not have the ability to hire, fire, and promote can be categorized as supervisors if they have control over an employee’s daily activities); EEOC v. Rotary Corp., 297 F. Supp. 2d 643, 663 (N.D.N.Y. 2003) (holding that the employee qualified as a supervisor because he could change “the work activities and schedules of employees working in the facility”).


122. *Mack,* 326 F.3d at 126.
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In *Mack v. Otis Elevator Co.*, the court asked the question: whether a ‘“mechanic in charge”’ qualified as a supervisor of mechanics at a worksite when the “mechanic in charge” could “assign and schedule work, direct the work force, assure the quality and efficiency of the assignment, and . . . enforce the safety practice and procedures.” The court explicitly rejected the *Parkins* test. The court looked instead at “whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.”

The court cited the Supreme Court’s reasoning in *Ellerth* and *Faragher* that when employers allocate power to an employee, that employee’s “power and authority invests his or her harassing conduct with a particular threatening character,” which may cause the “victim . . . [to] be reluctant to accept the risks of blowing the whistle on a superior.” The court analyzed the definition of supervisor by weighing the amount of power given to a supervisor and how such power could affect his or her relationship with fellow employees.

The court then analyzed the broader definitions of supervisor set out by other courts and agencies, and chose to adopt the EEOC’s definition of supervisor. The EEOC holds that an employee is a “‘supervisor’ if: (a) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or (b) [t]he individual has authority to direct the employee’s daily work activities.”

After broadening the definition of supervisor to include those with authority to direct another individual’s daily work activity, the court held that the “mechanic in charge” qualified as a supervisor for Title IV.

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123. *Id.* at 120 (citing Collective Bargaining Agreement between Otis Elevator and Local 1 International Union of Elevator Constructors).
124. *Id.* at 126.
125. *Id.*
126. *Id.* at 125 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 803(1998)).
127. *Id.* at 125-26.
129. *Id.* at 127 (citing EEOC Enforcement Guidance on Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999)).
VII purposes. The court held that because the employee had the authority to direct the daily work activities of the other mechanics on the shift, he could be characterized as a supervisor. Since constructive discharge did not qualify as a tangible employment action, the court held that the employer could assert the affirmative defense outlined in Ellerth and Faragher.

Critics of the broader view argue that it provides little clarity, and employers are unable to distinguish between who qualifies as a supervisor and who does not. Detractors argue that this lack of clarity will prevent or discourage employers from taking the preventative actions that the Supreme Court sought to encourage.

IV. THE EFFECTS OF THE CONSTRUCTIVE DISCHARGE ISSUE ON THE QUESTION

Although the Supreme Court decided not to hear the appeal in Mack, the holding in another Supreme Court decision lends insight into the Court’s goal with the Ellerth and Faragher framework. In Suders, the Court analyzed the question: whether constructive discharge served as a tangible employment action for Title VII purposes.

A. Pennsylvania State Police v. Suders and Implications for the Supervisor Question

In 2004, the United States Supreme Court addressed the question: whether a constructive discharge caused by a supervisor’s harassing behavior “ranks as a tangible employment action and therefore

130. Id.
131. Id.
132. Id. at 127-28.
134. Id.
136. Suders, 542 U.S. at 143.
precludes assertion of the affirmative defense articulated in *Ellerth* and *Faragher*.” 137 The Court held that in cases where an employee has been constructively discharged, the case should be treated as if an “actual termination” occurred from a damages standpoint. 138 But the Court distinguished between a constructive discharge precipitated by an “official act” and a constructive discharge resulting from harassing behavior that does not involve an official act. 139

The Court held that a constructive discharge could be caused by the harassing behavior of a supervisor who has carried out an “official act.” 140 Further the Court distinguished a category of constructive discharge precipitated by an official act from a typical tangible employment action of termination because the official act in the constructive discharge context could include other official actions by a supervisor including demotion, transfer, and disciplinary actions. 141

The Court then addressed the question: how and if the Court should categorize constructive discharge if there is no official act precipitating the employee’s resignation. 142 The Court held that in cases where the supervisor does not cause an official act to be taken against an employee, the affirmative defense established in *Ellerth* and *Faragher* should be available to the employer. 143

**B. How Suders Affects The Supervisor Definition Debate**

If the Supreme Court had held that constructive discharge equated to a tangible employment action in all cases and therefore an employer could not seek an affirmative defense, then the broader view for the definition of supervisor may have been buttressed. 144 Since proponents of the narrower view focus on whether the

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137. *Id.* at 140.
138. *Id.* at 148-49.
139. *Id.* at 149-50.
140. *Id.* at 148.
143. *Id.*
144. *See Chamallas, supra* note 50 (stating that the circuit courts are split over whether constructive discharge amounts to a tangible employment action for Title VII purposes).
employee had the power to directly affect a tangible employment action, a categorical classification of constructive discharge would have further extended the class of supervisors.\textsuperscript{145} The Court prevented such a leap by stating in the beginning of its opinion that employees can be constructively discharged by both coworkers and supervisors.\textsuperscript{146} The Court did not intend to extend vicarious liability to employers for the actions of coworkers, but rather addressed what burdens and defenses would arise if the supervisor’s conduct resulted in a constructive discharge.\textsuperscript{147}

The Court stated that there are two classes of cases that \textit{Ellerth} and \textit{Faragher} sought to address.\textsuperscript{148} First, the Court recognized there is a class of cases in which a supervisor takes a tangible employment action against a supervisee.\textsuperscript{149} The second class of cases consists of situations in which a supervisor’s actions do not constitute a tangible employment action, but the agency relationship has created a “threatening character” for the supervisor’s actions.\textsuperscript{150} The Court then reiterated its reasoning in \textit{Ellerth} and \textit{Faragher} by holding employers liable for the actions of supervisors unless they could establish an affirmative defense.\textsuperscript{151} The Court wanted employers to take preventative measures to identify harassment and give employees an opportunity to blow the whistle.\textsuperscript{152}

The Court noted that even though it wanted to give employers motivation to pursue such preventative measures, a line had to be drawn for when employers could be held vicariously liable.\textsuperscript{153} The majority held that an employer could not be vicariously liable for the constructive discharge of an employee unless the supervisor had

\textsuperscript{145} See Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 913 (E.D. Tenn. 2003) (“A supervisor is an employee who has the power to make economic decisions and effect tangible employment actions with respect to subordinates”).

\textsuperscript{146} Suders, 542 U.S. 148.

\textsuperscript{147} See \textit{id.} at 143.

\textsuperscript{148} See \textit{id.} at 144-45.

\textsuperscript{149} \textit{Id.} at 144.

\textsuperscript{150} \textit{Id.} at 145.

\textsuperscript{151} \textit{Id.} at 145-46.

\textsuperscript{152} Suders, 542 U.S. at 145.

\textsuperscript{153} See \textit{id.} at 148-49.
taken an official action against the employee.\textsuperscript{154} Justice Ginsburg, writing for the Court, reasoned that when supervisors take actions of which an employer has no notice, the employer does not have the opportunity to quell the abusive behavior.\textsuperscript{155}

Proponents of both the narrow and broader views of the supervisor question could find supporting arguments in the \textit{Suders} decision.\textsuperscript{156} Since proponents of the narrow view believe clarity is a major goal of \textit{Ellerth} and \textit{Faragher}, they would say that the broad definition does not work within the constructive discharge paradigm.\textsuperscript{157} This definition, they could argue, leaves an employer with great insecurity if he has to guess which employees have enough authority to make him liable for actions that cause another employee to be constructively discharged.\textsuperscript{158} They would conclude that the best way to provide clarity and notice would be to adopt the view that supervisors are only those who can carry out tangible employment actions.\textsuperscript{159}

Proponents of the broader view could argue that the Court continues to pursue goals that "encourage the creation of antiharassment policies and effective grievance mechanisms."\textsuperscript{160} Further, proponents would argue that the Court should give employers incentive to create these policies and procedures when an employer knowingly gives power to an employee that "materially [augments] the ability" of that employee to "create a hostile work environment for his or her subordinates."\textsuperscript{161} As the Second Circuit suggested in \textit{Mack}, this might be done by extending the definition of supervisor to include those with control over daily activities.\textsuperscript{162}

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} See generally \textit{Suders}, 542 U.S. 129 (approaching the argument of whether to hold employers vicariously liable for constructive discharge by first analyzing the \textit{Ellerth} and \textit{Faragher} framework).
\textsuperscript{157} Id.
\textsuperscript{159} See id.
\textsuperscript{160} See \textit{Suders}, 542 U.S. at 145 (quoting Burlington Indus., Inc. v. \textit{Ellerth}, 524 U.S. 742, 764 (1998)).
\textsuperscript{161} See \textit{Mack v. Otis Elevator Co.}, 326 F.3d 116, 126 (2nd Cir. 2003).
\textsuperscript{162} Id. at 127.
V. THE MODERN WORKPLACE AND THE DISTRIBUTION OF POWER

Many critics of the narrow view believe that defining supervisors as only those who can carry out tangible employment actions ignores the complexity of today's workplace. Critics of the broader view argue that any definition that fails to provide an easily applicable method for identifying and training supervisors on discrimination policies runs counter to the language of Ellerth. This Part will examine the trends in the modern workplace and the arguments that can be made for both the broader and narrow views.

A. The Changing Workplace

Donna Deeprose recently discussed the trend in many workplaces toward an organizational structure made up of self-directed teams. Workplaces that develop the team-oriented concept may reduce or completely dissolve the need for the traditional supervisor. Some employers are even experimenting by delegating the power to initiate tangible employment actions to team members. For example, team members may have the ability to take formal disciplinary action against employees who are late or have poor work product. Many employers may establish "peer disciplinary review committees," which consist of team members serving on a rotating basis. These committees may provide a solution to the problems created when employers infuse supervisors with the power of the company. Peer disciplinary review committees allow employees to "no longer see

163. See, e.g., Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 509-10 (7th Cir. 2004) (Rovner, J., concurring in part and concurring in the judgment) (arguing that the Seventh Circuit's bright line rule allowed employers to avoid liability when there were multiple worksites with tangible employment actions were made from the central office).
164. See Browne, 286 F. Supp. 2d at 914.
165. See infra Part V.A-B.
167. Id. at 19.
168. See id. at 120-21.
169. Id.
171. See id. at 325.
job security as dependent on relationships with individual managers.\textsuperscript{172}

While these new self-directed teams may be the wave of the future, these transformations will take time because management must first be convinced of the system’s benefits.\textsuperscript{173} Moreover, it will also take additional effort and time to change the organizational structures of companies that have traditional power hierarchies.\textsuperscript{174} Meanwhile, the courts must adapt to ensure that they do not apply an antiquated legal doctrine to a changing and dynamic workplace.\textsuperscript{175}

\textbf{B. The Arguments for Both Sides in Light of Modern Trends}

Critics of the narrow viewpoint to cases in which there have been obvious abuses of supervisory power, but because the employees did not have the power to hire, fire, and promote, the employer escaped liability.\textsuperscript{176} But the broader view analyzes the relationship between employees to see if one employee has the power to create a hostile environment with the aid of power allocated by the employer.\textsuperscript{177} This approach may work better than the traditional rule, especially within the team atmosphere where new leaders will emerge either through company appointment or natural selection.\textsuperscript{178}

Critics of the broader view argue that employers will be liable for team leaders who have no direct authority to take tangible employment actions.\textsuperscript{179} This phenomenon, they assert, could then cause companies to reconsider changing to a team-oriented structure.\textsuperscript{180} They argue that the narrow view better suits the team-oriented structure because it “treats all employers equally” no matter

\begin{itemize}
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id. at xxiv.
\item \textsuperscript{174} See id.
\item \textsuperscript{175} See Rhodes v. Ill. Dep’t of Transp., 359 F.3d 498, 510 (7th Cir. 2004) (Rovner, J., concurring in part and concurring in the judgment).
\item \textsuperscript{176} Id.
\item \textsuperscript{177} See Mack v. Otis Elevator Co., 326 F.3d 116, 126 (2nd Cir. 2003).
\item \textsuperscript{178} See Peter Rutter, Sex, Power, and Boundaries, 137-38 (1996).
\item \textsuperscript{179} See Blackman, supra note 116, at 156-57.
\item \textsuperscript{180} Id. at 157.
\end{itemize}
whether the employer has a traditional hierarchy or a team-oriented structure.\textsuperscript{181}

While critics raise a valid argument that there is value in being able to select, train, and monitor a small group of people, a positive effect may be derived by expanding the definition of supervisor since companies will be more likely to disseminate sexual harassment policies to a larger pool of people.\textsuperscript{182} The Supreme Court wanted to encourage employers to take this form of preventative action, hoping that employers would train and monitor those who have been allocated power in the organization.\textsuperscript{183}

VI. WHICH IS THE BETTER APPROACH?

Proponents of the Parkins rule (narrow) and the Mack definition (broader) both have strong arguments.\textsuperscript{184} The Parkins definition provides a bright line rule since the employer will only be vicariously liable for those people with the power to take tangible employment actions against employees.\textsuperscript{185} On the contrary, the approach taken in Mack provides potential harassment victims a shield from the power allocated to employees even though that power does not include the ability to take tangible employment actions.\textsuperscript{186}

The best definition is the Parkins definition as interpreted by the Browne court.\textsuperscript{187} The district court judge in Browne interpreted the Parkins rule to mean that the definition of supervisor does not just include those who have the ability to hire, fire and promote, but also includes those with the ability to “initiate, recommend or effect” such actions.\textsuperscript{188}

\textsuperscript{181} Id.
\textsuperscript{184} See supra Parts II-III.
\textsuperscript{185} See supra Part II.
\textsuperscript{186} See Mack v. Otis Elevator Co., 326 F.3d 116, 125 (2nd Cir. 2003).
\textsuperscript{187} See supra Part II.B.
DEFINITION OF ‘SUPERVISOR’

The Supreme Court in Ellerth held that when a supervisor takes a tangible employment action, the employer should be vicariously liable. The Court’s only reference to the power allocated to the supervisor by the employer comes in this section of Ellerth. The Court explained that supervisors are a “distinct class of agent[s]” who make “decisions affecting other employees under his or her control.” The Court does not give further examples of how a supervisor might be given power by the agency relationship. If the Court had wanted to extend the definition of supervisor to those with control over daily activities, they would have made reference to such a definition.

The Court noted that the employer should be responsible for tangible employment actions taken by a supervisor because there is an “official act” within the company which will give the employer notice. The company will most likely have a procedure set up for when a tangible employment action is taken that would allow other management to review the decision of the supervisor. If an employee merely has control over daily activities, the employer may not receive notice when that employee is harassing another. Courts would extend vicarious liability too far if employers were vicariously liable for situations where another employee has any control, especially where the exercise of that control gives no notice to the employer.

While proponents of the Parkins rule might agree with the preceding argument, the Parkins definition as applied recently by the Seventh and Eighth Circuits should not prevail. Instead, courts should

190. See id. at 762.
191. Id.
192. See id. at 761-63.
193. But see Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998) (stating that “supervisors were granted virtually unchecked authority” over their subordinates, “directly controll[ing] and supervis[ing] all aspects of [Faragher’s] day-to-day activities”).
195. Id.
196. See id. (espousing the idea that the notice acquired when an employee takes a tangible employment action is an important factor in holding the employer liable).
also recognize that supervisors include those who have the “power to recommend, set in motion, or effect such actions.”

Such an extension of the Parkins rule would find at least partial support from the EEOC, and it would also find support in Ellerth. While the EEOC may disagree with the refusal to extend the definition to those with control over daily work activities, the agency does define an employee to be a supervisor if “the individual has authority to undertake or recommend tangible employment decisions affecting the employee.”

Additionally, the Court in Ellerth recognized a case where a supervisor did not make the final decision to take a tangible employment action. In that case, the Court held the employer liable because the committee taking the tangible employment action “functioned as the supervisor’s ‘cat’s-paw.’” Ellerth opens the door to the interpretation that one does not have to be the final decision maker in order to be a supervisor. This definition will also allay many of the concerns of proponents of the broader view because it will prevent employers from just transferring the final decision making authority out of the supervisor’s hands to avoid liability.

VII. ELEVENTH CIRCUIT COURTS

The most referenced decision within the Eleventh Circuit dealing with the issue of who is a supervisor for Title VII claims is Dinkins v. Charoen Pokphand USA, Inc. In Dinkins, the employer asked the

198. Id. at 916.
199. EEOC Enforcement Guidance on Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999); Ellerth, 524 U.S. at 762 (citing Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990)).
201. Ellerth, 524 U.S. at 762 (citing Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990)).
202. Id.
203. Id.
205. See 133 F. Supp. 2d 1254 (M.D. Ala. 2001); see also Mack v. Otis Elevator Co., 326 F.3d 116, 126 (2nd Cir. 2003) (citing Dinkins for the proposition that other courts extended the definition of supervisor to those with control over daily work activities).
court to adopt the definition of supervisor followed by the Seventh Circuit. The court rejected this approach, noting that while the narrow view provided a simple approach, it ignored the Supreme Court's implication that cases of this sort should undergo the scrutiny of a "multifactorial analysis." After analyzing the reasoning behind the narrow view and the reasoning put forth in Ellerth, the court defined a supervisor as

one who has the actual authority to take tangible employment actions, or to recommend tangible employment actions if his or her recommendations are given substantial weight by the final decisionmaker, or to direct another employee's day-to-day work activities in a manner that may increase the employee's workload or triggers the assignment of additional or undesirable tasks.

The court also held that if an employee has some actual authority and is perceived by his coworkers as having more authority, the doctrine of apparent authority allows an employee to hold an employer liable for these actions.

The majority also stated that the Eleventh Circuit has long adopted a broader view of the term supervisor. This generalization may overstate the position of the Eleventh Circuit since only one other district court in the Eleventh Circuit is cited to support this statement.

The court also asserted that the Eleventh Circuit extended the definition of supervisor to include those who have the ability to "increase the employee's workload or assign additional or

207. *Id.*
208. *Id.* at 1265.
209. *Id.* at 1266.
210. See *id.* (citing Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1069 (M.D. Ala. 1990)).
211. *Id.*
undesirable tasks." 212 Although the court implied that this reading had to be inferred from *Johnson*, it warrants a closer examination of *Johnson*. 213

In *Johnson*, a female radio host alleged the cohost, who was also the program director of her show, harassed her and then had significant input in having her transferred to another time slot. 214 The employee filed charges with the EEOC, including sexual harassment charges against the radio station. 215 The district court granted summary judgment for the employer on those claims and the Eleventh Circuit heard the appeal. 216

Rather than directly addressing whether the program director (and cohost) acted as a supervisor after the transfer, the Eleventh Circuit avoided the issue and remanded the case back to the trial court for further hearings. 217 The majority began addressing the vicarious liability issue by emphasizing the importance of determining whether the cohost acted as a supervisor. 218 Although the court identified the issue, it did little to actually answer the question or provide insight into how the lower court should answer this question on remand. 219 The majority did state that the cohost “clearly” supervised the plaintiff before her transfer, but the question of whether he supervised her after the transfer remained. 220 The court only hinted that the cohost may have still “wielded some power” over the employee after the transfer because he called meetings that conflicted with her schedule. 221

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214. *Id.* at 505.
215. *Id.* at 506.
216. *Id.* at 506-07.
217. *See id.* at 511.
218. *Id.* at 508. The court explained how this determination would affect the radio station’s liability and then continued to discuss the possibility of an affirmative defense if the transfer did not amount to a tangible employment action. *Id.*
219. *See Johnson*, 234 F.3d at 511.
220. *Id.*
221. *Id.*
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The Eleventh Circuit’s opinion could confuse the reader on at least one front. The court stated that the cohost “[c]learly . . . supervised Johnson when she worked on the Morning Show.” The court then remanded the case to the lower court to determine whether the cohost continued to supervise Johnson after she transferred. In its conclusion, however, the court stated that a question of material fact still exists regarding whether the cohost supervised Johnson “at the time of the transfer,” leaving in doubt the question of whether the cohost was ever her supervisor. While this may seem trivial, one can now argue that the court failed to articulate a clear definition of supervisor for the lower courts, and the assertion that the Eleventh Circuit follows the broader definition of supervisor goes too far.

CONCLUSION

Although the Supreme Court provided clarity for when an employer can be vicariously liable for a supervisor’s harassing behavior, it has not yet clarified who qualifies as a supervisor. As a result, depending on the jurisdiction, employers may or may not be liable for the actions of employees.

Although proponents of the narrow view emphasize the clarity associated with defining supervisors as only those who can cause tangible employment actions against an employee, there appears to be a split even within those courts as to whether the employee has to be the final actor. Proponents of the broader view, on the other hand, emphasize that a more pragmatic approach is necessary as the workplace structure diversifies. While both the narrow and broader

222. See id. at 513.
223. Id. at 511.
224. Id.
225. Johnson, 234 F.3d at 513.
226. But see Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001). As noted earlier, the court made the inferential leap from the decision in Johnson that an employee could be deemed a supervisor if he can assign different or additional tasks. Id.
227. See supra Part I.
228. See supra Parts II-III.
229. See supra Part II-A-B.
230. See supra Part III.
views contain strong arguments, the best approach combines elements of both.\footnote{231}

The Eleventh Circuit should define a supervisor as one who can initiate, recommend, or effect a tangible employment action against another employee.\footnote{232} Such a paradigm is more suited to holding employers accountable in cases where an employee has control over a person, but does not have the final authority to hire, fire, promote, demote, or discipline.\footnote{233}

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\footnotetext{231}{See supra Part VI.}
\footnotetext{232}{See supra Parts VI-VII.}
\footnotetext{233}{See supra Part VI.}